In the District Court of the United States for the District of Massachusetts

CIVIL ACTION No. 51-65

THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, defendant Interstate Commerce Commission (hereinafter termed Commission) and intervening defendants, signatories hereto, submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

OPINION BELOW

The opinion of the District Court for the District of Massachusetts was rendered on July 30, 1951. A copy of the opinion and judgment entered the same day are attached hereto as Appendix A.

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JURISDICTION

The judgment of the District Court was entered on July 30, 1951. A petition for appeal is presented to the District Court herewith, to wit, on September 25, 1951. Jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101 (b). *United States* v. *Capital Transit Co.*, 338 U. S. 286.

QUESTION PRESENTED

Where the Commission, a body "appointed by law and informed by experience" has prescribed a relationship of rates affecting ports of exit and where the relation so prescribed has persisted for almost half a century despite repeated complaints from virtually all of the ports affected, should the opinion of said Commission in the case underlying this appeal, based on substantial evidence, be allowed to stand, or should the Court below be permitted to substitute its judgment for that of the Commission to the extent of weighing and preponderating conflicting evidence?[1]

STATUTES INVOLVED

Sections 1 (5) and (6), 3 (1) and (1a), 14 (1), 15 (1) and (7), 15a (2) and the National Transportation Policy are set forth in Appendix B hereto.

STATEMENT

Beginning with the turn of the century com-

[1] All of the points raised in the Assignment of Errors are also presented. The questions presented, as stated above, sets forth the major issue.

petition among rail carriers serving Buffalo, N. Y., and having various routes to North Atlantic ports, Boston, Mass., to Baltimore, Md., inclusive, for the movement of ex-lake grain[2] for export, had become so keen that the rates had fallen as the result of rate wars to the ridiculous level of 2 *mills* per bushel or 1/6 of a *cent* per 100 pounds. The situation was so serious that all interests, carriers, shippers, and ports, importuned the Commission to prescribe what it might consider a proper relation of rates among the various ports. This the Commission did in a report titled *In the Matter of Differential Freight Rates*, 11 I. C. C. 13, decided April 27, 1905. The differentials or relationships prescribed on grain moving over all-rail routes from the territory west of a line drawn from Buffalo through Pittsburgh, Pa., were 1 cent per 100 pounds at Philadelphia and 1½ cents per 100 pounds at Baltimore, under the rates to New York and Boston. On the ex-lake grain, here involved, the differential was made ½ cent per 100 pounds in favor of Philadelphia and Baltimore.

These differentials have persisted in spite of repeated attacks, three by New York, two by Boston, and one by Baltimore.[3] In a decision in

[2] "Ex-lake" grain originates for the most part in northwest United States and Canada and moves via lake vessels to Buffalo where it is trans-shipped to rail cars.

[3] *Chamber of Commerce of State of New York* v. *New York Central & Hudson River Railroad*, 24 I. C. C. 55 (1912); *Maritime Asso. Boston Chamber of Commerce* v. *Ann Arbor R. R. Co.*, 95 I. C. C. 539 (1925), 126 I. C. C. 199 (1927); *Baltimore Chamber of Commerce* v. *Ann Arbor R. R. Co.*, 159 I. C. C. 691 (1929); and *Port of New York*

1951 (248 I. C. C. 165) the Commission made significant findings. At page 176, it stated:

> But aside from the matter of costs and the record affords no basis for a finding in that respect, it seems beyond question, as previously stated, that the actual service rendered by the carriers at New York, and included in the line haul rate, is greater than that rendered by those serving Philadelphia and Baltimore.

which led it to conclude, page 183:

> We agree that if the line-haul service alone were to be considered, there are no conditions present that would warrant a lower rate to Baltimore than to New York. However, we believe that the terminal operations are sufficiently different to justify, under section 1 of the act, the 0.5-cent differential assailed.

The difference in terminal "conditions" referred to arises from the fact that at Philadelphia and Baltimore the service of the carriers ends when the railroad car is spotted at the door of the grain elevator. At New York this is not true. There the grain is first transferred from the railroad car through differing types of elevating equipment to a grain barge (one elevation) and then by lighter to a floating elevator through which it is loaded in the vessel. Thus, at New York the rail carriers perform under the line-haul rate one elevation and one lighterage service in addition to the service performed at Philadelphia and Baltimore.

Authority v. *Baltimore & O. R. R. Co.*, 248 I. C. C. 165 (1951).

In the instant case the Commission held that there have been no changes in the circumstances and conditions affecting the handling of the traffic today which would warrant a conclusion different from that reached in 1941. Indeed, this Court could judicially notice the fact that the costs of performing the additional services must be far greater than they were in 1941 (Compare *Atchison, T. & S. F. Ry. Co.* v. *United States,* 284 U. S. 248, at page 260).

The same rail carriers serving New York which, in 1941, successfully defended the 0.5-cent differential upon their contention, *inter alia,* that it was warranted by the more extensive and expensive terminal services performed in New York harbor, proposed in the instant case to wipe out the differential. They contend that what in 1941 was a sound defense to a complaint may now be ignored by them as an element of rate making.

The District Court has set aside the decision and order of the Commission on eroneous grounds. It has said in effect that the Commission has incorrectly evaluated the evidence; that it has failed to set forth with sufficient explicitness the preliminary findings leading to its ultimate conclusions; and that the decision represents an unwarranted interference with the rate-making initiative of the respondent carriers. The Commission's finding as to differences in terminal conditions and services reflects, in itself, substantial evidence sufficient to sustain its order.

THE QUESTIONS ARE SUBSTANTIAL

Despite the 0.5-cent differential in their favor the combined tonnage of grain through Phila-

delphia and Baltimore did not equal that through New York for the 19-year period 1930 to 1948, inclusive.[4] In the 29-year period, 1920 to 1948, inclusive, the port of New York attracted 1,026,900,000 bushels of Canadian grain as against a combined total of 520,300,000 bushels for Philadelphia and Baltimore.[5] It has only been since the close of the war when the Government, pursuant to its foreign aid policy, became the principal exporter of grain that Philadelphia and Baltimore have been able to outdraw New York and this has been due primarily to the fact that the two ports first named have a greater elevator capacity where grain may be stored awaiting exportation.

The ports of Philadelphia and Baltimore do not argue that the Commission should be controlled as to this rate differential solely by changes in the ebb and flow of grain traffic through the various ports. They do insist, however, that if substantially less terminal services are performed at Philadelphia and Baltimore than at New York with respect to the movement of this export grain, they are entitled to have this *service* difference translated into a *rate* difference. To deny this would be to ignore the "transportation standard" which the Supreme Court has held must govern the matter of rates and rate relationships, whether initiated by the carrier or prescribed by the Commission. ***Texas & P. R. Co.*** v. ***United States,*** 289 U. S. 627, at p. 637.

[4] The figures are 380,484,000 bushels for Philadelphia and Baltimore as against 445,819,000 for the port of New York (Exhibit 29—Witness Bradley).

[5] Exhibit 48—Witness Frazier.

The substantial questions for the consideration of the Supreme Court on appeal may be summarized as follows:

1. Did the Court below improperly substitute its judgment for that of the Commission and thus attempt to perform an administrative rather than a judicial function.

2. Did the Court below, in assuming that the differential prescribed by the Commission in 1905, was "based *wholly* on the ocean-rate advantage of Boston and New York," commit error which is fatal to its reasoning.

3. Whether the Court below has incorrectly interpreted the decisions in *Texas & P. R. Co.* v. *United States,* 289 U. S. 627; and *United States* v. *Chicago, M. St. P. & P. R. Co.,* 294 U. S. 499.

4. Whether the Court below has committed error in its failure to recognize the distinction between traffic which orginates at Buffalo, and traffic, such as that here involved, which originates *beyond* Buffalo and merely passes through the latter point in a through movement to the ports.

5. Whether the Court below erred in its failure to accord sufficient weight to the demonstrated differences in terminal services at New York, on the one hand, and Philadelphia and Baltimore, on the other hand, and to the substantially longer hauls to Boston and Portland than to the other ports, and

6. Whether the Court below erred in its attempt to distinguish the fundamental law involved on the basis of a difference in the *form* of this proceeding as compared with

an earlier determination by the Commission on the same subject matter.

7. Was the action of the plaintiff railroads the first step in the precipitation of a destructive rate war which the Commission was duty bound under the law to stop at its inception as it did.

1. The doctrine of administrative finality as it bears upon decisions of the Commission had its origin in *Interstate Commerce Commission* v. *Ill. Cent. R. Co.*, 215 U. S. 452; and *Interstate Com. Comm.* v. *Union Pac. R. Co.*, 222 U. S. 541. In the first of these cases, after setting forth the duty of a Court of review to consider whether the power exerted by the Commission was within the constitutional power of Congress to delegate and whether the order under review was within the scope of the power delegated and based upon substantial evidence, the Court went on to say at page 470:

> Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatsoever to the proposition that we may, *under the guise of exerting judicial power, usurp merely administrative functions,* by setting aside a lawful administrative order upon our conception as to whether the administrative power *has been wisely exercised.* [Emphasis ours.]

In the second decision, the Court restated with affirmation the views above expressed and added, at page 547:

> In determining these mixed questions of law and fact, the Court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, *or whether, on like testimony, it would have made a similar ruling.* "The findings of the Commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." *Illinois C. R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441. Its conclusion, of course, is subject to review, but, when supported by evidence, is *accepted as final;* not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine *whether there was substantial evidence to sustain the order.* [Emphasis ours.]

In the opinion below the Court has substituted its judgment for that of the Commission in a number of preliminary respects as well as in the final conclusion. The Commission is criticized for failing to make specific findings on certain points, to which the Court below has ascribed probative value (pages 10, 11, 15, 16).[6] This, in spite of the facts that (a) the report of the Commission contains some thirty-five separate preliminary findings of fact both *pro* and *con,* and that (b) its final report is prefaced with this statement:

> Exceptions and requested findings not dis-

[6] Page references are to Appendix A hereof.

> cussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified:

In other respects the Court below has substituted its judgment for that of the Commission in ascribing considerable importance to differences in the *form* of the proceeding (pages 14 and 15 and 17). In still others, it has imposed its own ideas of the importance to be placed on matters of record which were before the Commission and which were considered and discussed by it in reaching its conclusions (pages 14, 15, 17).

We are mindful of the recent decision in *Universal Camera Corp.* v. *National L. R. Bd.*, 340 U. S. 474, as to whether the Administrative Procedure Act has created any change in the range of Court review on the question of the substantiality of evidence. Giving it the broadest possible interpretation we must still be guided by the statement in that opinion reading:

> But a standard leaving an unavoidable margin for individual judgment does not leave the judicial judgment at large even though the phrasing of the standard does not wholly fence it in.

If the principle that a reviewing court in its search for "substantiality" is free to examine each piece of conflicting evidence and preponderate it according to its own ideas, is carried to its logical conclusion, what is to become of decisions in that type of case in which the Commission has original and exclusive jurisdiction, such as those involving the question of reasonableness? (Compare *Texas & P. Ry. Co.*, v.

Abilene Cotton Oil Co., 204 U. S. 426). In this connection it is important, also, to note that the statutory test which a proposed rate, put under suspension, must meet is whether it is *"just and reasonable."* (U. S. Code Title 49, Section 15 (7).)

The decision below has raised some very important questions on the doctrine of administrative finality which may be summarized:

> (a) Does the Administrative Procedure Act[7] so change the field of judicial censorship as to require a reviewing Court, in determining the question of "substantiality," not alone to search for countervailing evidence but to weigh and preponderate it?
>
> (b) Should the final decision as to questions of fact, or as to questions of law inextricably interwoven with questions of fact, be left to the "body of experts appointed by law and informed by experience," or should it rest in a reviewing Court?
>
> (c) If questions of reasonableness are to be determined by the Courts, how can uniformity, which is the keynote of the Act, be maintained? *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (See also *Howitt* v. *United States*, 328 U. S. 189, 192; *Mitchell* v. *United States*, 313 U. S. 80, 94, 95).

2. At page 5 of its decision the Court below stated:

> The Commission's recommendation in 1905 of a 0–5-cent differential * * * seems *to have been based wholly* on the ocean-rate advantage of Boston and New York.

[7] Section 10 (e), 5 U. S. C. § 1009 (e).

> The Commission pointed out that the ocean rates fluctuated greatly and that it was almost impossible to say just how much those from Baltimore and Philadelphia exceeded those from New York and Boston, but it thought there was some difference, at least 0.5 cent per hundred pounds (11 I. C. C. at 23–25, 75). [Emphasis ours.]

The degree of importance attached to those erroneous observations is reflected in the following statements at pages 8 and 9 of the opinion:

> Thus, the Commission and the parties agree that while New York and Boston at one time had an advantage in ocean rates which offset the rail differential, the steamship lines have in general, at least since 1935, quoted the same rates from all North Atlantic ports. Whereas, formerly, the total transportation cost from the inland point of origin to the foreign destination was about the same through all the ports, after 1935 the total cost was 0.5 cent per hundred pounds less through Baltimore and Philadelphia. This finding, we think, *is highly significant,* for, as pointed out above, *the only clear ground advanced by the Commission* in the 1905 proceeding for recommending the 0.5-cent differential on the ex-lake grain was that it would offset the ocean-rate disadvantage of the ports of Baltimore and Philadelphia. (See 11 I. C. C. at 75.) [Emphasis ours.]

When the Commission considered this matter in 1905 there were two distinct sets of differentials, viz, one covering *all-rail* traffic from points west of the Buffalo-Pittsburgh line and north of the Ohio River under which rates to Phila-

delphia were 2 cents and to Baltimore 3 cents under the rate to New York and Boston. The other was the *ex-lake* differential, here involved, which had varied from time to time but which was then 0.4 cent per bushel, or 2/3 cents per 100 pounds in favor of Philadelphia and Baltimore.

A study of the Commission's decision will plainly show that it did not consider it possible to arrive at any definite relation between land rates to the ports and ocean rates beyond. If the Court below is correct in assuming that ocean rates from New York and Boston, prior to 1935, were 0.5 cent lower than from Philadelphia and Baltimore, *and that that was the sole reason* for the differential, how could that fact be reconciled with the action of the Commission, in the same case, in fixing differentials of 1 cent and 1.5 cents on *all-rail* grain from the territory immediately west of Buffalo?

To show the fallacy of concluding that the Commission in 1905 regarded differences in ocean rates, *or any other single element*, as controlling we have only to refer to pages 66 and 67 of its decision where it said:

> We have endeavored to find some fundamental principle by the application of which this dispute might be laid at rest, *but entirely without success.* [Emphasis ours.]

Perhaps the best illustration of our point is the following from those pages of the Commission's report:

> If in this case it were possible to definitely establish the same through rate by all these ports, if it ever had been possible to

> do so, the advisability of such an adjustment would deserve serious consideration. *It is, however, impossible to apply that rule in fact.* The ocean rate from every port is continually fluctuating and is seldom the same for two days in succession. It even varies from hour to hour. The rate may be higher from Baltimore today and from New York tomorrow. It cannot, therefore, be determined what inland differential would produce equal rates through all the ports. [Emphasis ours.]

This record shows conclusively that if, in 1935, there had been any appreciable change in the relation of ocean rates, New York and Boston *vis a vis* Philadelphia and Baltimore—a proposition which we seriously doubt[8]—its benefits to the latter ports were purely illusory. In 1936, the year immediately following the supposed equalization, Baltimore handled no ex-lake grain at all. In the 4-year period 1936 to 1939, inclusive, New York handled roughly 81,000,000 bushels of ex-lake grain as against 35,000,000 bushels from Baltimore and Philadelphia combined.[9]

3. The opinion below accepts as correct plaintiffs' interpretation of the decisions in *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499; and *Texas & Pac. Ry. Co.* v. *United States*, 289 U. S. 627. (p. 6). Implicit in this acceptance is the premise that so long as a rate

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[8] In *Maritime Asso. Boston Chamber of Commerce* v. *Ann Arbor R. Co.*, 126 I. C. C. 199, 204 (1927) the Commission found that a substantial parity of ocean rates from all North Atlantic ports had existed since *1925*

[9] Exhibit 29—Witness Bradley.

proposed by a rail carrier is quantitatively within the "zone of reasonableness" it must be allowed to stand unless there is a positive finding that section 2 or section 3 will be violated.

Since it is a fact—which the Court below recognizes—that the terminal services rendered at New York are more extensive and expensive than those rendered at Philadelphia and Baltimore, then undue prejudice would be worked against the latter ports by forcing upon them, against their wishes, a parity of rates. In other words, undue prejudice would result from forcing upon a port a *parity* of rates despite a clear advantage in transportation conditions, just as effectively as it would by subjecting it to a *higher* rate under substantially similar transportation conditions.

No adverse inference may properly be drawn from the failure of the Commission *in this case* to make a specific finding under section 3 of the Act. The Commission's authority over the rates herein involved derives from par. (7) of section 15 (See Appendix B). Under that section the burden of proof is specifically placed upon the proponent to "show that (the proposed) rate is *just and reasonable.*" The Commission in rejecting the schedule simply found that the rail carriers had not sustained that burden.

In its decision in the *Milwaukee Case*, 294 U. S. 499, the Court did not deny that the Commission had the power to reject the schedules which it had suspended.[10] It simply said that its ultimate

[10] In *Ayrshire Collieries Corp.* v. *United States*, 335 U. S. 573, the Court affirmed the action of the Commission in rejecting schedules covering the precise adjustment.

conclusions were not fortified by preliminary findings of sufficient explicitness. In other words, the Court stated (p. 511):

> We must know what a decision means before the duty becomes ours to say whether it is right or wrong.

There is no such lack of explicitness here. The Commission in a well considered report has reviewed the history of the differential and the series of attacks against it; has outlined all of the contentions of the parties; has made some thirty-five separate findings of fact; and has concluded that there have been no changes in circumstances and conditions since its decision in 1941 (248 I. C. C. 165) which would warrant a conclusion different from that then reached.

Other circumstances make the decision in the *Milwaukee Case* valueless as a precedent to support the conclusions of the Court below. They are: (a) The Court in that case considered only the bare *quantum* of the rate, and (b) made it clear that none of the elements of discrimination or of a rate war or destructive competition was present.[11] Those considerations are most important. In this case, as we have pointed out, approval of the proposed adjustment would work a positive case of undue prejudice as against Philadelphia and Baltimore. By announcing its

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[11] At page 506, the opinion recites:

"We lay to one side cases of discrimination or preference or rivalry so keen as to be a menace (rate war) to steady and efficient service called for by this statute. *These tendencies excluded* a carrier is entitled to initiate rates, and, in this connection to adopt such policy of rate making as to it seems best." [Emphasis and parentheses ours.]

intention at the hearing before the Commission to restore the differential at Baltimore if the Commission should approve the proposed rates, the Baltimore and Ohio Railroad Company clearly and unequivocally accepted the challenge of plaintiffs to embark on a rate war as to which the latter took the first step in the publication of this rate. At p. 21 of its opinion the Court below makes light of this latter possibility by stating:

> The only suggestion of such a possibility was the statement made at the close of the hearing before the Commission by counsel for the B. & O. that if the reduction was allowed, that carrier would propose a like reduction in its rates to maintain the differential; no such statement was made in behalf of any of the other carriers.

With the utmost respect we submit that these observations show a complete lack of understanding on the part of the Court of the play of forces which underlie competition in rate making. The Pennsylvania Railroad also serves Baltimore and has a single-line route shorter than that of the B. & O. It could not, and would not, stand by and allow the B. & O. to undercut it in the matter of rates without losing the traffic. And with the differential restored at Baltimore its restoration at Philadelphia would follow as surely as night follows day. That is the relation which has existed since 1905 and which the two carriers just mentioned are vigorously defending.

Moreover, since the decision in the *Milwaukee Case* (1935), Congress has enacted a national transportation policy (see Appendix B) in which

the Commission is admonished, among other things, to adjust rates so as to prevent "destructive competitive practices." If, as the Court below insists, it is good law and in keeping with the doctrine of the *Milwaukee Case,* to allow the New York Central over the objection of the Baltimore and Ohio to reduce the New York rate by ½ cent, it is equally good law for the latter carrier to reduce its rate to Baltimore by a similar amount. In the celebrated case of *Lake Cargo Coal,* 199 I. C. C. 367, the southern coal-carrying lines made similar contentions as to their right to reduce rates on coal to Lake Erie ports and thus narrow the spread or differential as between the southern mines which they serve and the northern mines served by competing railroads. As to the contention the Commission said at 390, 391:

> *Their rights in this regard cannot be superior to the rights of other carriers.* If conceded to them, and our inquiry must stop with a finding that the rates proposed, however low, are justified when it appears that they yield substantially more than out-of-pocket costs, regardless of their effect upon other carriers or the ultimate effect upon other commodities, then in like circumstances *we must concede the same right to each and every set of carriers which may claim it.* [Emphasis ours.]

Lastly, the decision in the *Milwaukee Case* must be read in the light of the statute then in effect under which the Commission had power to suspend a proposed rate. At that time (1935) while the Commission was given power to suspend any proposed *"new* * * * rate, fare, or

charge" the statute (section 15 (7)) went on to provide that

> At any hearing involving a rate * * * sought to be *increased* * * * the burden of proof to show that the *increased* rate * * * is just and reasonable shall be upon the carrier * * * (Emphasis ours).

In the *Milwaukee Case* the carrier proposed reduced rates and the Commission nevertheless placed the burden of proof upon it under the general rule of law that the burden should be on the proponent (*Coal From Indiana to Illinois*, 200 I. C. C. 609, 621). In 1940, the Act was materially amended so far as the burden of proof is concerned. The amended par. (7) of section 15 now reads:

> At any hearing involving a *change* in a rate * * * the burden of proof shall be upon the carrier to show that the proposed *changed* rate is just and reasonable * * *

Speaking of this amendment in Senate Report No. 433, 76th Congress, First Session at p. 5, Chairman Wheeler of the Senate Committee on Interstate and Foreign Commerce said:

> * * * the rule that the burden of proof in respect of changes in rates shall lie with the proponent thereof has been made applicable to reductions as well as increases. In this way, it is expected rate wars may be reached in their inception.

Under the present statute, with the burden of proof specifically placed on the proponents of the change, the Commission's range of discretion

is much broader and specifically authorizes rejection of the proposed rates for failure to produce proof convincing to the Commission that they are "just and reasonable."

Far from supporting the contentions of plaintiffs, the decision in the *Texas & Pacific Case, supra,* is authority for the opposite view. Responsive to a complaint that the carriers in equalizing import and export rates from and to New Orleans had created undue prejudice against Texas ports by ignoring substantial advantages in distance in their favor, the Commission had prescribed on certain commodities a schedule of differentials in favor of the Texas ports under section 3 of the Act. In the same decision it exempted petroleum products and blackstrap molasses from the sweep of its order on the sole ground that New Orleans had not been receiving more than a "fair share" of such traffic. The Court, in no uncertain terms, rejected that sort of differentiation.[12] It stated (p. 645) that "there is no *transportation difference* discoverable in the record between this traffic and that of the other freights affected by the order." Previously the Court had held (p. 637) that while carriers are free to adjust rates to meet competition, etc., they may not in doing so "depart from the *transportation standard,* conformity to which the Act contemplates, and substitute others which are prohibited." The standards thus condemned were purely *commercial* standards having as their

[12] The Court also considered the validity of the order on other grounds, such as the question whether a "port" through which export and import traffic passed in through transportation, was a "locality" within the meaning of section 3.

objective the diversion of traffic from one port to another. In the instant case the plaintiff railroads frankly concede that the sole purpose of the proposed rate is to divert traffic from Philadelphia and Baltimore to New York and Boston. Otherwise they say, and the lower Court agrees that the reduction "they propose would be futile." (p. 17). As to this type of motivation the Court, in the *Texas & Pacific Case,* said at p. 637:

> A tariff published for the purpose of destroying a market or building up one, *of diverting traffic from a particular place* to the injury of that place, *or in aid of some other* is unlawful. [Emphasis ours.]

The "transportation standard" from which the proposed tariff departs is the conceded difference in terminal conditions. We submit that the decision in the *Texas & Pacific Case* affords direct support for our position.

4. At page 10 of its decision the Court below quotes from the report of the Commission that "on classes and commodities generally, other than grain, the export rates from Buffalo are the same to New York, Boston and Portland, as to Philadelphia and Baltimore." The quotation was followed immediately by this statement:

> In the absence of some considerations which would distinguish the ex-lake grain from the other commodities, this finding *should furnish strong support for the reasonableness of the proposed rates.* [Emphasis ours.]

This observation completely overlooks the evidence which does "distinguish" ex-lake grain, on the one hand, and classes and commodities *origi-*

nating at Buffalo, on the other hand. The former is not Buffalo traffic at all. It is *through* traffic which originates in northwest United States and Canada and is merely passing through Buffalo in the course of its *through* journey from the country origin to the port of exit.[13]

In its original decision prescribing the differential (11 I. C. C. 13), the Commission said at p. 74:

> It (ex-lake grain) should not be regarded as originating at Buffalo since it is there only temporarily in transit. (Parentheses added for clarity).

Plainly the Court has not only made a comparison of unlike things but has clearly substituted its judgment as to the weight to be accorded to this circumstance.

5. While recognizing, as it must (pages 13, 14), that substantially greater terminal services are performed at New York than at Philadelphia and Baltimore, the Court below has completely minimized these differences as an element in determining the propriety of the rate relationship. At page 14, for example, the opinion sets forth:

> The difference in physical operations might indicate that the rates to the ports would not have to be the same; to that extent the Commission's statement [14] that the terminal operations are sufficiently different "to

[13] As a matter of fact it was a similar state of facts which impelled the Court to hold in the *Texas & Pacific Case*, *supra*, that a "port" was not a "locality" within the meaning of section 3, prior to its amendment.

warrant" the differential may well be accurate.

We submit that under the principle enunciated in *Texas & P. Ry. Co.* v. *United States,* 289 U. S. 627, 637, 645, this difference in the measure of the terminal services rendered at the respective ports is inherent in the "transportation standard" and that it would be unlawful either for the carriers in *initiating,* or for the Commission in *prescribing* rates, to ignore this *difference* in such "standard" for the sole purpose of diverting traffic away from Philadelphia and Baltimore. (*Ibid.,* p. 637.)

The Court below seeks to escape that hypothesis by a negative process of reasoning. It points out, for example (p. 14), that the Commission made no finding that the proposed rate to New York would be noncompensatory. This is entirely beside the point. The relation of rates is ordinarily of more importance than their intrinsic level. A rate might well be reasonable *per se* under section 1 (5) and still be *relatively* unreasonable under the same section (*Wyoming Coal Co.* v. *Virginian Ry. Co.,* 98 I. C. C. 488, 496, 497; affirmed in *Virginian Ry. Co.* v. *United States,* 272 U. S. 658); or unduly prejudicial under section 3 of the Act (*United States* v. *Illinois C. R. Co.,* 263 U. S. 515, 524).

Likewise, it is stated that the Commission made no finding that the proposed rate would result in a violation of section 3 (1), the opinion reciting at page 14:[15]

[14] In its decision in 1941 in 248 I. C. C. 165, at p. 183.

[15] The same point was made as to section 2 of the Act (p. 14) but it is unimportant here. There could be no section 2 violation unless the destinations were the *same*.

> But on the record before the Commission and the history of the differential, a holding of undue prejudice on the basis of *terminal costs* would not have been warranted. (Emphasis ours).

As stated, in the framework of the statute under which the Commission acted (Section 15 (7)), and on the issue presented, it was under no obligation to make a specific finding that the proposed rate, would create undue prejudice. The Commission *might* have made such a finding in explanation of its action or for information. Its failure to do so does not invalidate its order or create any adverse implication (Compare *Beaumont, S. L. & W. R. Co.* v. *United States,* 282 U. S. 74, 86, 87; *United States* v. *Baltimore & O. R. Co.,* 293 U. S. 464, 465).

Finally, the lower Court pointed out that the Commission had made no finding that the 0.5-cent differential was a precise reflection of the difference in cost. We do not agree that the Commission should be held to such a degree of mathematical precision in its consideration of a case (Compare *Baltimore & O. R. Co.* v. *United States,* 298 U. S. 349, at 378). Plainly, additional costs are incurred in rendering these additional services. It is true that when the Commission set these differentials in 1905, it did not base them on precise differences in cost. If it had done so it could be argued quite forcibly that they should be much greater now. The Commission did say, however, in 1905:

> The expenses of delivery at New York are

> materially more than in Philadelphia (11 I. C. C. 64).

and in 1941 it said:

> However, we believe that the terminal operations are sufficiently different to justify, under section 1 of the Act, the 0.5-cent differential assailed (248 I. C. C. 183).

If the lower Court seriously doubted that these *service* differences cost as much as ½ cent per 100 pounds it could have remanded the case for a determination of that point. It was not necessary to strike down the entire order.

While it is true that additional elevation and lighterage services are not performed at Boston and Portland, the greater distance to those ports, as compared with the distance to Philadelphia and Baltimore, equally requires the differential just as the differences in terminal services require it at New York.

6. At pp. 13 and 14 of its opinion, the Court points out that in its 1941 decision (248 I. C. C. 165) the Commission merely found that the differences in terminal services were sufficient to "*warrant*" the carriers in maintaining the differential. Here it said, "the Commission had to find more, namely, that the difference in terminal operations *requires* the carriers to maintain the differential in order to avoid violation of some specified section of the statute. The Commission made no such finding."

In this conclusion we respectfully submit that the lower Court has indulged in legalistic semantics. The basic law is not changed, depending

upon whether a railroad is a defendant in a "complaint and answer" case, or a respondent in an "investigation and suspension" proceeding. It is true that a carrier may voluntarily do what the Commission could not compel it to do. But even this propositon finds its limitations in the basic law. To illustrate, a carrier might voluntarily create a rate group by ignoring differences in distance which the Commission could not compel it to ignore as, for example, the voluntary maintenance of a parity of rates as between Boston and New York. But if it should do so to the extent of depriving a locality of a substantial advantage it enjoys under the *"transportation* standard" or for the sole purpose of "diverting traffic," such locality could successfully complain against the carrier's action. *Texas & Pacific Ry. Co.* v. *United States,* 289 U. S. 627. The requirement to maintain the existing differential is implicit in the Commission's finding that the proposed parity of rates would not be "just and reasonable."

7. This point is sufficiently discussed in connection with point 3.

It is submitted that the decision of the Court below is in effect a clear substitution of judgment for that of an administrative body of experts "appointed by law and informed by experience," and amounts to an improper usurpation of a quasi-legislative or administrative function. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 410

THE INTERSTATE COMMERCE COMMISSION, BALTIMORE & OHIO RAILROAD COMPANY, ET AL., *Appellants,*

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, THE BOSTON AND MAINE RAILROAD COMPANY, THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

KENNETH F. STONE,
ROBERT J. FLETCHER,
JOHN J. REILLY,
B. J. VIVIANO,
TIMOTHY J. MURPHY,
R. A. BRICKLEY,
OLIVER R. WAITE,
LEANDER I. SHELLEY,
WILBUR LAROE, JR.,
FREDERICK E. BROWN,
ARTHUR L. WINN,
SAMUEL H. MOERMAN,
WILLIAM L. BAXTER,
WILLIAM H. KERR,
Counsel for Appellees.

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DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 51-65

THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.,

Plaintiffs,

against

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants

MOTION TO AFFIRM

Appellees, The New York Central Railroad Company, Boston and Maine Railroad, The Delaware, Lackawanna and Western Railroad Company, Lehigh Valley Railroad Company, The Port of Boston Authority, Maritime Association of The Boston Chamber of Commerce, Inc., Boston Flour & Grain Exchange, Foreign Commerce Club of Boston, Inc., the Port of New York Authority, and The City of Boston, pursuant to Rule 12, Paragraph 3, of the Rules of the Supreme Court of the United States, move that the judgment of the District Court be affirmed.

This is a direct appeal from the final judgment, entered July 30, 1951, by a specially-constituted District Court of three judges,[1] established pursuant to 28 U. S. C., Secs.

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[1] The Court, consisting of Chief Circuit Judge Calvert Magruder, Chief District Judge George C. Sweeney, and District Judge Francis J. W. Ford, rendered its opinion on July 30, 1951.

2284 and 2325, setting aside an order of the Interstate Commerce Commission. On August 9, 1951, the District Court ordered that the judgment be stayed until further order of that Court. On September 25, 1951, appeal was allowed, at which time the appellees were served with the appeal papers.

The order of the Interstate Commerce Commission directed that the railroad appellees cancel their proposed tariff schedules equalizing certain grain rates via their lines of railroad to the North Atlantic ports of Boston, Portland, Albany and New York with those via the lines of railroad appellants to Baltimore and Philadelphia from Buffalo, Oswego and Ogdensburg, New York.

A petition for reopening, reargument and reconsideration was filed by the appellees herein and was denied by the Commission on December 4, 1950.

Background and Nature of the Proceedings

The pertinent facts, as they appear from the report of the Commission (278 I. C. C. 31) and the opinion of the District Court (Appendix A of Statement As To Jurisdiction), are as follows:

The rail rates involved are those for transporting ex-lake grain, grain having had a prior movement on the Great Lakes, to ocean ports for export (Report, 278 I. C. C. at 33; Opinion, p. 13).

Prior to 1905 there was intense carrier competition in rates to and from North Atlantic Ports on various commodities, including ex-lake export grain. The matter was investigated by the Interstate Commerce Commission, and, after hearing the parties in interest, the Commission made certain recommendations, one of which was that there be a differential on ex-lake export grain in favor of Baltimore and Philadelphia (*In the Matter of Differential Freight Rates to and from North Atlantic Ports,* 11 I. C. C. 13).

It should be noted that in its 1905 report the Commission did not prescribe differentials, as the appellants suggest in their Statement As To Jurisdiction (page 3). The Commission said, page 77:

> "This is not a proceeding in which the Commission could make an order nor do we intend to intimate that the facts appearing would justify an order in any proceeding."

The differential in issue was and is carrier made. The attacks by the various interests over the years have always been upon whether the carriers should be permitted to maintain the differential, not, as in this case, upon whether they should be required to maintain it against their will.

The appellees proposed three changes in their tariff schedules in their efforts to equalize the North Atlantic ports on ex-lake export grain: (1) elimination of the rate differential, (2) increasing the free storage period at New York, and, (3) increasing storage charges at Portland and Boston. The Commission permitted the increase in free storage time at New York to go into effect as being just and reasonable, but denied removal of the differential and increase in the storage charges at Portland and Boston. Increasing the storage charges at Portland and Boston was proposed by the carriers as a concession toward full equalization, and, pending such equalization through removal of the differential, the carriers serving those ports are not interested in increasing their storage rates. The only issue here is the differential.

The Questions Propounded by Appellants Are Unsubstantial

The major question presented by appellants in their Statement as to Jurisdiction (page 2) is the following:

> "Where the Commission, a body 'appointed by law and informed by experience' has prescribed a relation-

ship of rates affecting ports of exit and where the relation so prescribed has persisted for almost half a century despite reepated complaints from virtually all of the ports affected, should the opinion of said Commission in the case underlying this appeal, based on substantial evidence, be allowed to stand, or should the Court below be permitted to substitute its judgment for that of the Commission to the extent of weighing and preponderating conflicting evidence?"

The error in this question is the assumption that the Commission prescribed the relationship of rates under consideration. As previously stated (*supra*, page 3), this relationship of rates (or differential) was not prescribed in the 1905 proceeding or in any subsequent proceeding. The District Court did not substitute its judgment for the Commission's but found that the Commission had failed to perform its functions as an administrative body. The appellants contend that the mere conclusion by the Commission "that the proposed schedules have not been shown to be just and reasonable" may not be questioned even though not supported by adequate findings. This is clearly not the law (*Florida* v. *United States*, 282 U. S. 194). Appellants also would have the District Court close its eyes to the record as a whole and not consider the extensive and impressive proof adduced by the appellees before the Commission. It is clear "that a reviewing Court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view" (*Universal Camera Corp.* v. *Labor Bd.*, 340 U. S. 474, 488). The appellants would have the District Court judges be, as so well expressed by Mr. Justice Frankfurter, "automata" or "the

judicial echo of the Board's conclusion" (*Universal Camera Corp.* v. *Labor Board, supra,* 491).

The balance of questions submitted by appellant as substantial, commencing at page 7 of Statement as to Jurisdiction, stem from the same erroneous contention discussed above and urge that the reviewing Court must accept the Commission's ultimate conclusion though the reasons therefor are not revealed in its report nor can it be justified from the record as a whole.

The Court Below Properly Disposed of All Issues

The appellees' attack upon the decision and order of the Interstate Commerce Commission in the District Court was upon the grounds that it was erroneous in law, unsupported by essential basic findings, and unsupported by substantial evidence on the record as a whole. The District Court in its opinion upheld appellees' contentions and its opinion, properly disposes of the issues raised in this appeal.

The basic position of appellees is that the railroads may freely adjust their rates to meet competition so long as their rates are within the so-called zone of reasonableness and produce no undue prejudice, preference or discrimination prohibited by the Act. The District Court accepted this as a basic principle fully supported by authority, citing *U. S.* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 294 U. S. 499, 506 (1935) and *Texas and Pacific Railway Co.* v. *U. S.*, 289 U. S. 627, 635-637 (1933).

The District Court noted that the Commission itself had previously recognized, even in cases involving ex-lake grain differentials, that carriers may lawfully make voluntary rate adjustments which the Commission could not require them to make, citing *Galveston Commercial Association* v. *Abilene and Southern Railway Company*, 109 I. C. C. 114, 121, 125 (1926); *Port of New York Authority* v. *Baltimore*

& Ohio Railroad Co., 248 I. C. C. 165, 180 (1941); *Ex-Lake Grain from Ogdensburg to New England*, 208 I. C. C. 385, 391 (1935); *Maritime Association of Boston Chamber of Commerce* v. *Ann Arbor Railroad Co.*, 126 I. C. C. 199, 211 (1927).

The District Court then discussed the evidence offered before the Commission in support of the proposed schedules and concluded that on all the evidence the appellees had established *prima facie* that their proposed schedule of rates was just and reasonable and turned to the report of the Commission to find a basis for its holding that the proposed rates should be disallowed.

The District Court held that the Commission has the duty to set forth in its report the "basic" or "essential" or "quasi-jurisdictional" findings necessary to support its ultimate conclusion. It found that the Commission had not fulfilled such duty in this case, where in the presence of impressive evidence to support the proposed schedule, it did no more than state as its ultimate conclusion that "the proposed schedules have not been shown to be just and reasonable", citing *Beaumont, Sour Lake & Western Railway Co.* v. *U. S.*, 282 U. S. 74, 86-87 (1930) and other cases.

The Court further stated that where the ultimate finding is in the negative form as in this case, the report must contain sufficient basic findings of fact to warrant a reviewing court in concluding that the Commission was not without rational grounds for refusing to find the proposed schedules "just and reasonable" within the meaning of Section 1(5) of the Interstate Commerce Act or free of "unjust discrimination" prohibited by Section 2 or containing no undue or unreasonable preference, prejudice or disadvantage, within the prohibition of Section 3(1), citing *U. S.* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 294 U. S. 499, 506-508 (1935).

Differences in the cost of terminal operations at New York as compared with Baltimore and Philadelphia had been suggested by the Commission as a basis for requiring a higher rate to New York than to Baltimore and Philadelphia. The District Court held that though such considerations might be relevant where the carriers were defending the differential against attack by port interests they were not controlling where the carriers were seeking to remove the differential, as in the case at bar. In the former case such differences were sufficient to *warrant* the differential but in the latter case the Commission must find that the differences in terminal operations *require* the carriers to maintain the differential in order to avoid violation of some provision of the Act. The Commission made no such finding.

The District Court found there was no finding, and no basis in the record for a finding, that greater terminal service in New York would make the proposed rates to New York noncompensatory or so low as to burden other traffic, or in some other particular to violate the requirement of reasonableness under Section 1(5) of the Act.

The District Court observed that the Commission had not found the proposed rate equalization to be unjustly discriminatory as to shippers in violation of Section 2, nor unduly prejudicial to Baltimore and Philadelphia or unduly preferential to New York in violation of Section 3(1) of the Act.

The District Court then discussed the differences in distances between Buffalo and the ports of Baltimore and Philadelphia on the one hand and Boston and Portland on the other. The Court held that since the proposed rates would exceed the minimum previously set by the Commission and the Commission did not find they would result in undue prejudice to Baltimore and Philadelphia and

in view of the decision of the Commission in an earlier case that these differences in distance were not of sufficient magnitude to require a higher rate to Boston than to Baltimore and Philadelphia that this particular reason for cancelling the proposed rates was not a valid one (*Maritime Association of Boston Chamber of Commerce* v. *Ann Arbor Railroad Co.*, 95 I. C. C. 539, 571-572 (1925).)

In discussing the statement of the Commission that the appellee railroads as respondents in a suspension proceeding instead of as defendants in a complaint proceeding are not relieved of the burden of showing that the proposed rates are just and reasonable which burden includes rebuttal of any evidence tending to show that equalization as proposed would have an effect upon the movement of traffic that would be unjust to Baltimore and Philadelphia, the Court declined to accept the construction of the Commission's statement made by Commissioner Mahaffie in his dissent which would in effect require carriers to show that the proposed reduction would be futile. The Court found that the statement of the Commission fell short of an express finding that the proposed rate equalization would result in such a drastic diversion of traffic as to work undue prejudice to Baltimore and Philadelphia in violation of Section 3(1) and concluded that the statement of the Commission was not a sufficient basic finding to support its ultimate conclusion.

The evidence and statements of the Commission with reference to the present "abnormal conditions" namely, the control of grain movements by the governments of the United States and Great Britain is thoroughly discussed in the opinion. The Court found there was no basis for the Commission to conclude that the return to "normal conditions" would take place in the near or the foreseeable future; that while the Commission must look ahead in making a finding that undue prejudice would result from

a given course of conduct there should be a certain immediacy to that future effect, and that the Commission is fully empowered to correct the situation should such future changes in conditions cause the equalization to result in undue prejudice. The appellant railroads offered no suggestion that the proposed equalization would now or at any time in the future bring about such a diversion of traffic as to result in undue preference to either Boston or Portland.

In examining the Commission's statement that a long-standing adjustment such as the one here involved should not be changed to meet conditions of a temporary nature even though somewhat protracted and of uncertain duration, the Court found this to be an insufficient reason for denying the carriers the right to change a differential. The possibility that a rate war might result was considered and found by the Court to be insufficient justification to sustain the Commission's action since it has adequate power to deal with such a situation should it arise.

Having found that the Commission's decision lacked adequate findings and substantial evidence to support its conclusion the District Court found it unnecessary to pass upon the plaintiff's additional contention that since export rates on all other commodities from Buffalo are the same to all the ports, the rate equalization of ex-lake grain here proposed is in fact required by the Jones Amendment 54, Stat. 902 (1940), now Section 3(1a) of the Interstate Commerce Act.

Conclusion

Since it is evident the appeal herein presents questions which are neither novel nor substantial, it is respectfully submitted that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

THE NEW YORK CENTRAL RAILROAD COMPANY,
BOSTON AND MAINE RAILROAD,
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
LEHIGH VALLEY RAILROAD COMPANY,
By KENNETH F. STONE,
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MARITIME ASSOCIATION OF THE BOSTON CHAMBER OF COMMERCE, INC.,
BOSTON GRAIN AND FLOUR EXCHANGE,
FOREIGN COMMERCE CLUB OF BOSTON, INC.,
By B. A. BRICKLEY,
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THE PORT OF NEW YORK AUTHORITY,
By LEANDER I. SHELLEY,
WILBUR LA ROE, JR.,
FREDERICK E. BROWN,
ARTHUR L. WINN,
SAMUEL H. MOERMAN,
CITY OF BOSTON,
By WILLIAM L. BAXTER,
Corporation Counsel;
WILLIAM L. BAXTER, and
WILLIAM H. KERR,
Its Attorneys.

APPENDIX "A"

UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

Civil Action No. 51-65

THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.,
Plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants

Before Magruder, Circuit Judge, and Sweeney and Ford, District Judges

R. J. Fletcher and Kenneth F. Stone, with whom Neal J. Holland, Francis L. Brown, B. J. Viviano, and John F. Reilly were on brief, for plaintiffs.

Walter D. Matson, Attorney, Office of the Solicitor, United States Department of Agriculture, and William D. McFarlane, Special Assistant to the Attorney General, with whom H. G. Morrison, Assistant Attorney General, James E. Kilday and John F. Baecher, Special Assistants to the Attorney General, George F. Garrity, United States Attorney, and Charles W. Bucy, Associate Solicitor, United States Department of Agriculture, were on brief, for the Secretary of Agriculture, intervening plaintiff, and United States of America, defendant.

B. A. Brickley, with whom Timothy J. Murphy, Assistant Attorney General, Commonwealth of Massachusetts, William L. Baxter, Corporation Counsel, City of Boston, Oliver R. Waite, and Brickley, Sears & Cole, were on brief, for Port of Boston Authority, Maritime Association of the Boston Chamber of Commerce, Inc., Boston Grain and Flour Exchange, Foreign Commerce Club of Boston, Inc., and City of Boston, intervening plaintiffs.

Wilbur La Roe, Jr., with whom Henry E. Foley, Foley, Hoag & Eliot, Leander I. Shelley, General Counsel, Port of New York Authority, Frederick E. Brown, Arthur L. Winn, Jr., and Samuel H. Moerman, were on brief, for The Port of New York Authority, intervening plaintiff.

Edward M. Reidy, Associate Chief Counsel, with whom Daniel W. Knowlton, Chief Counsel, was on brief, for Interstate Commerce Commission, defendant.

Harry C. Ames, with whom Sumner Babcock and James B. Doak were on brief, for Chamber of Commerce of Philadelphia and The Commercial Exchange of Philadelphia, intervening defendants.

Paul V. Miller, with whom Anthony P. Donadio, Lockwood W. Fogg, W. Harvey Small, and Choate, Hall & Stewart were on brief, for Baltimore & Ohio Railroad Company, The Reading Company, Pennsylvania Railroad Company, and Western Maryland Railway Company, intervening defendants.

Karl J. Grimm, for Baltimore Association of Commerce and The Baltimore Chamber of Commerce, intervening defendants.

OPINION OF THE COURT

July 30, 1951

MAGRUDER, *Circuit Judge:*

This action was brought by the New York Central, Boston and Maine, Delaware, Lackawanna and Western, and Le-High Valley railroads, pursuant to 28 U. S. C. §§ 1336, 2321-2325, to set aside and enjoin enforcement of an order of the Interstate Commerce Commission cancelling certain new rate schedules proposed by the plaintiff railroads. *Investigation and Suspension Docket No. 5641, Export Grain from Buffalo to New York,* 278 I.C.C. 31 (1950). The United States in its answer admitted all the allegations of the complaint and prayed that the relief requested be granted, and the Secretary of Agriculture and various commercial and port interests in Boston and New York intervened on behalf of plaintiffs. The action has been defended by the Commission, intervening commercial and port interests in Philadelphia and Baltimore, and the Baltimore and Ohio, Pennsylvania, Reading, and Western Maryland railroads.

In the schedules filed to become effective April 11, 1949, plaintiffs proposed to reduce by 0.5 cent per hundred pounds the export rates on ex-lake grain (grain having had a prior movement on the Great Lakes) from Buffalo and Oswego, N. Y., to Albany, N. Y., Boston, Mass., New York,

N. Y., and Portland, Maine, and from Ogdensburg, N. Y., to Boston; to increase from ten days to twenty days the period of free storage time on grain held for export at New York; and to increase to 0.07 cent per bushel per day the storage charges on grain held for export at Portland and Boston. The effect of these proposed changes would have been to equalize rail rates, free time storage allowance, and storage charges on ex-lake grain from Buffalo for export through Portland, Boston, New York, Philadelphia and Baltimore. On protest of the port interests in Baltimore and Philadelphia and the railroads serving those cities, the Commission suspended the proposed schedules pending an investigation into their lawfulness. After hearing and review by the Commission, it issued its order cancelling the schedules, upon an ultimate finding "that the proposed schedules have not been shown to be just and reasonable except the proposed increase in free storage time at New York, which we find just and reasonable." (278 I.C.C. at 39.) No objection has been made here to this increase in free storage time. As to the proposal to increase storage charges at Boston and Portland, it was indicated at the hearing before the Commission that this was a concession advanced only for the purpose of bringing about complete equalization among the ports, and that the plaintiffs did not desire the increases if the proposed rail-rate reductions were not permitted. Since the lower storage charges at Boston and Portland are considered a competitive advantage to those cities, the Baltimore and Philadelphia interests would of course have no objection to the increase therein. Consequently, the only question before this court is the correctness of the Commission's holding on the proposed rate reductions to Albany, Boston, New York and Portland.

The existing differential on ex-lake grain of 0.5 cent per hundred pounds in favor of Baltimore and Philadelphia under New York and Boston was established by the railroads in 1905, upon the recommendation of the Commission. *In the Matter of Differential Freight Rates to and from North Atlantic Ports,* 11 I.C.C. 13 (1905).[2] Prior to that

[2] As to the rates to Albany, see *Albany Port District Commission* v. *Ahnapee & Western Ry. Co.,* 219 I.C.C. 151 (1936).

time there had been intense carrier competition both for the ex-lake grain and for grain which was shipped entirely by rail (hence, "all-rail grain") from central and western territories, and the many rate agreements entered into by the carriers with regard to this traffic had invariably proved ineffective. In the 1905 proceeding, the Commission, at the request of the competing carriers, sought to arbitrate the dispute and to arrive at rate relationships which would be fair to all the ports. As the Commission stated (11 I.C.C. at 66): "The rates are to be so adjusted that there can be fair competition for this business via all the ports, so that no one shall possess a distinct advantage over the other."

In the 1906 proceeding, the Commission concluded that on the all-rail grain, Philadelphia should be given a 1.0-cent differential, and Baltimore a 1.5-cent differential, under New York and Boston. These differentials were apparently intended partly to give effect to the shorter rail distances to Baltimore and Philadelphia, and partly to offset the lower ocean rates which prevailed from Boston and New York. The all-rail differentials are still in effect, and are not under attack here. As the Commission pointed out in the instant case (278 I.C.C. at 33 note 4), the ex-lake and all-rail differentials, though originating in the same proceeding, no longer bear any relationship to each other. They are not competing routes, since the all-rail grain originates principally in the central United States producing area, while the ex-lake grain is largely from Canada or from northwestern United States (278 I.C.C. at 33).

On the ex-lake grain, the Commission stated in the 1905 report that Baltimore and Philadelphia had no substantial rail-distance advantage. See also *Maritime Association of Boston Chamber of Commerce* v. *Ann Arbor Railroad Co.*, 95 I. C. C. 539, 571 (1925). The Commission's recommendation in 1905 of a 0.5-cent differential in their favor seems to have been based wholly on the ocean-rate advantage of Boston and New York. The Commission pointed out that the ocean rates fluctuated greatly and that it was almost impossible to say just how much those from Baltimore and Philadelphia exceeded those from New York and Boston, but it thought there was some difference, at least 0.5

cent per hundred pounds. (11 I. C. C. at 23-25, 75.) In the light of the objective sought in the proceeding, quoted above, the Commission must have concluded that, because of the ocean-rate differences, Baltimore and Philadelphia needed a rail-rate differential fairly to compete.

While the differential on ex-lake grain has been in effect since 1905, it has by no means been acceptable to all parties at all times. Indeed, the commercial and port interests at nearly every port involved have attacked the differential on one or more occasions. *Chamber of Commerce of State of New York* v. *New York Central & Hudson River Railroad Co.*, 24 I. C. C. 55 (1912); *Maritime Association of Boston Chamber of Commerce* v. *Ann Arbor Railroad Co.*, 95 I. C. C. 539 (1925), rehearing 126 I. C. C. 199 (1927); *Baltimore Chamber of Commerce* v. *Ann Arbor Railroad Co.*, 159 I. C. C. 691 (1929); *Port of New York Authority* v. *Baltimore & Ohio Railroad Co.*, 248 I. C. C. 165 (1941). In each of these proceedings the Commission held the differential to be not unlawful and refused to change it. It should be noted, however, that in all of these attacks the Commission was asked to declare the existing differential unlawful; for the first time, in the instant proceeding, has the Commission been asked to find that a change in the differential proposed by one of the competing groups of railroads would be unlawful. Heretofore, the Commission has only had to decide whether to permit the carriers to maintain the differential; here the Commission has ordered the carriers to maintain the differential, or at least not to reduce it. It should also be noted that no order was or, according to the Commission's report, could have been, entered in the 1905 proceeding; the establishment and maintenance of the differential has up to now been entirely voluntary on the part of the railroads.

The Commission's decision is attacked here as being erroneous in law, unsupported by essential basic findings, and unsupported by substantial evidence on the record as a whole.

The primary position taken by plaintiff railroads is that carriers are free to adjust their rates to meet competition, so long as the adjusted rates are within the "zone of rea-

sonableness" and result in no undue prejudice or preference or discrimination prohibited by the statute. While the Commission has in its brief made an extended argument attacking this position, we think the plaintiffs' statement of the principle is sound and is adequately supported by authority. *United States* v. *Chicago, M., St. P. & Pac. Railroad Co.*, 294 U. S. 499, 506 (1935); *Texas & Pac. Ry. Co.* v. *United States*, 289 U. S. 627, 635-37 (1933). The Commission itself has previously recognized, even in cases involving the ex-lake grain differential, that carriers may lawfully make voluntary rate adjustments which the Commission could not require them to make. *Galveston Commercial Association* v. *Abilene & Sou. Ry. Co.*, 109 I. C. C. 114, 121, 125 (1926); *Port of New York Authority* v. *Baltimore & Ohio Railroad Co.*, 248 I. C. C. 165, 180 (1941); *Ex-Lake Grain from Ogdensburg to New England*, 208 I. C. C. 385, 391 (1935). See also *Maritime Association of Boston Chamber of Commerce* v. *Ann Arbor Railroad Co.*, 126 I. C. C. 199, 211 (1927). Of course, under 49 U. S. C. § 15(7), the plaintiffs had the burden of proof before the Commission to show that the proposed rate was "just and reasonable." "Conversely, the proposed schedule must be upheld as lawful unless adequate reasons are presented for finding it contrary to the statute." *Office Supplies from Glóucester, Mass., to Chicago*, 245 I. C. C. 669, 673 (1941).

To sustain their burden of proof and to support their claim that rate equalization is necessary if they are to meet competition, plaintiffs first showed, and the Commission found, that while New York had once had a preponderance of the ex-lake grain traffic from Buffalo for export, varying in the years 1930-1938, for example, from 68.33% to 100%, beginning in 1939 there had been a progressive decrease in New York's proportion of this traffic until in 1948, the last year for which full data was included in the record, it amounted to only 17.61%. During this same period, Baltimore's percentage, which had amounted to only 1.97% to 13.94% in the early thirties, showed a large increase beginning in 1938 until it amounted to 46.20% in 1948. Philadelphia, which had been on about an equal basis with Baltimore in the early thirties, also has had a considerable in-

crease, particularly since 1943, and its proportion in 1948 was 26.01%. The railroads serving New York thus contend that the 0.5-cent differential has resulted in a great loss of traffic to them over the last twelve years and that removal of the differential is necessary if they are to compete. Boston has not had any great proportion of this ex-lake grain since the first World War, and the percentages have fluctuated rather violently from year to year. In the thirties, the percentage varied from zero for several years to 13.91%, and the situation has been much the same since 1939, though starting with 1945 it has been somewhat more consistent, with 10.16% in 1948. Portland apparently has never had any of the ex-lake grain and was not included in the tariff until 1947. The railroads serving these ports claim that as long as the 0.5-cent differential in favor of Baltimore and Philadelphia exists they can get little or none of this grain traffic.

It is of course clear that the 0.5-cent differential cannot be the sole cause for the diversion of traffic to Baltimore and Philadelphia in recent years, for despite this rate disadvantage New York maintained a dominant position from 1905 to 1939. But the plaintiffs contend, and this contention was apparently accepted by the Commission, that various factors have operated together over the last twelve years to make the differential much more important than it had previously been. Thus, the Commission and the parties agree that while New York and Boston at one time had an advantage in ocean rates which offset the rail differential, the steamship lines have in general, at least since 1935, quoted the same rates from all the North Atlantic ports. Whereas formerly the total transportation cost from the inland point of origin to the foreign destination was about the same through all the ports, after 1935 the total cost was 0.5 cent per hundred pounds less through Baltimore and Philadelphia. This finding, we think, is highly significant, for, as pointed out above, the only clear ground advanced by the Commission in the 1905 proceeding for recommending the 0.5-cent differential on ex-lake grain was that it would offset the ocean-rate disadvantage of the ports of Baltimore and Philadelphia. (See 11 I. C. C. at 75.)

Another factor found by the Commission to have helped bring about the shift in traffic was a change in marketing practices. Formerly the shipment of grain was controlled by private commercial exporters who shipped mainly in parcel lots. Today most of the grain is shipped by the United States and British governments, both of which ship in much larger quantities, usually full cargoes. This change in export control is important for a variety of reasons. In the first place, it has rendered less valuable the advantage which New York has always had in good regular liner service, with frequent and direct sailings to all foreign ports. The commercial parcel-lot exporter is greatly influenced by this frequency of sailings, but since the American and British governments ship in such large quantities they utilize tramp steamers for the most part and the frequency of liner service is of considerably less importance to them. Also, there was uncontroverted testimony by government witnesses before the Commission, though no finding was made with respect thereto, that the government agencies are under rather strict instructions to use the cheapest transportation available; hence, they always favor Baltimore and Philadelphia and use New York, Boston and Portland only as overflow ports when Baltimore and Philadelphia are too congested. Finally, the superior storage facilities at Baltimore and Philadelphia [3] are of greater significance under the present export system, for they facilitate the necessary accumulation of large quantities of grain for full-cargo shipment.

In addition to the above evidence and findings indicating the importance of the differential and the necessity for its removal if plaintiff railroads are to compete for the ex-lake grain traffic, plaintiffs relied on various other evidence to sustain their burden of proof of showing that the proposed rate changes were just and reasonable. For example, on ample and apparently uncontroverted evidence,

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[3] In 1905, New York had an elevator capacity of 10,750,000 bushels, which far exceeded that at any of the other ports. Today Baltimore leads with 12,123,000 bushels, Philadelphia has a 4,750,000-bushel capacity, and New York has dropped to third place with 4,500,000. Boston and Portland each has 1,500,000.

the Commission found (278 I. C. C. at 33): "On classes and commodities generally, other than grain, the export rates from Buffalo are the same to New York, Boston, and Portland as to Philadelphia and Baltimore." In the absence of some considerations which would distinguish the ex-lake grain from the other commodities, this finding should furnish strong support for the reasonableness of the proposed rates.

There was further uncontroverted evidence, though the Commission failed to make any finding with respect to it, that the proposed rates would be 2.68 cents per hundredweight higher than the minimum rates set by the Commission in 1939 on this grain from Buffalo to New York, *Ex-Lake Grain to North Atlantic Ports*, 235 I.C.C. 415, even when the subsequent general increases affecting all rates are added on to this minimum.

In addition, the plaintiffs introduced evidence, though here again the Commission made no finding, to show that, because of the great shift in the grain traffic to Baltimore and Philadelphia, they must use much of their equipment in transporting grain to those cities, although their shares, in the division of the rate for those hauls make for much lower per car-mile earnings than they would receive on transportation over their own lines to New York and Boston, even after the 0.5-cent reduction in rates.

Certainly, on all this evidence the plaintiffs established prima facie that their proposed schedule of rates was just and reasonable. We now turn to the Commission's report to try to find the basis for its holding that the proposed rates should be disallowed.

In *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 86-87 (1930), the Supreme Court, while upholding a Commission order, took occasion to criticize the Commission for the unnecessary burden cast upon the reviewing court by the failure of the Commission to include in its report a complete statement showing the grounds upon which its determinations rested. Just how far the Commission is obliged by statute to go in this particular is not so clear as it might be. The Commission does have the duty to set forth in its report the "basic" or "essential" or "quasi-

jurisdictional" findings necessary to support its ultimate conclusion, though it must be recognized that such requirement is sometimes obscured in vague questions of degree. *United States* v. *Chicago, M., St. P. & Pac. Railroad Co.*, 294 U. S. 499 (1935); *United States* v. *Baltimore & Ohio Railroad Co.*, 293 U. S. 454, 463 (1935); *Florida* v. *United States*, 282 U. S. 194, 215 (1931). At least it can be said that the Commission does not fulfill its duty, in a case such as the present one, if it does no more than state as its ultimate conclusion that "the proposed schedules have not been shown to be just and reasonable." Should a carrier fail to appear or to offer any evidence in support of a proposed rate, perhaps a conclusion, such as the one above, that the carrier had failed to sustain the burden of proof imposed upon it by § 15(7) would be a sufficient basis for holding the rate unlawful. See *Powdered or Flaked Milk from Vermont to Boston*, 246 I.C.C. 522 (1941). But where, as here, the carrier has presented impressive evidence to support the proposed rate, the Commission may not hold the rate unlawful upon the mere statement that the carriers have not sustained their burden of persuasion. As stated in *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 533 (1946), an ultimate finding is not enough in the absence of a basic finding to support it. Where the ultimate finding, as here, is in the negative form, the report must contain sufficient basic findings of fact to warrant a reviewing court in concluding that the Commission was not without rational grounds for refusing to find, as the case might be, that the proposed schedules are "just and reasonable" within the meaning of § 1(5) of the Act, or are free of "unjust discrimination" prohibited by § 2, or contain no undue or unreasonable preference, prejudice, or disadvantage, within the prohibitions of § 3(1). *United States* v. *Chicago, M. St. P. & Pac. Railroad Co.*, 294 U. S. 499, 506-08 (1935). And these basic findings should be clearly stated and identified as such, so that the reviewing court will not be groping in the dark as to the grounds for the Commission's ultimate conclusion. See the last-cited case, 294 U. S. at 510-11.

So far as the report discloses, the only possible difference in cost of service which might be suggested as a basis

for requiring a higher rate to New York than to Baltimore and Philadelphia arises from the differences in terminal operations at these ports. In its report, the Commission states (278 I.C.C. at 38): "As pointed out by division 3 in the 1941 report, a lower rate to Philadelphia and Baltimore than to New York is not warranted by consideration alone of relative distances, but the terminal operations at New York are sufficiently different from those at Philadelphia and Baltimore to warrant the existing differential."

From the report, which is adequately supported by the record on this point, it appears that the tariffs as published apply to shipside—that is, there is no additional charge to the shipper at any of the ports except for the elevation or loading into the ship. This elevation charge is the same at all the ports, though at Baltimore and Philadelphia the railroads perform the service and receive the compensation, while in New York the elevation is performed and the remuneration received by an independent floating-elevator company, or by the New York Port Authority at its Gowanus Bay elevator. The actual physical handling of the goods, however, is quite different. In Baltimore and Philadelphia, the boxcars are brought to elevators owned by the railroads, the grain is elevated and stored in the elevators, and then loaded directly into ships by means of spouts. In New York, on the other hand, the grain is usually unloaded from the cars into the railroad's grain boats, stored in the boats until time to load on the ship, and then lightered at railroad expense to the floating elevator at shipside. There are some variations in this procedure. The New York Central and the Lehigh Valley, for example, have elevators on the Jersey side, but the grain is lightered from the elevators to shipside. At one time, apparently, ships did come to these elevators and load directly, but the witnesses testified that there had not been sufficient grain in the last few years to make it worth while; also this direct-loading system is probably more appropriate for full cargoes. When the New York Port Authority's Gowanus Bay elevator is used, there is direct loading into the ship, but no rail lines connect with the elevator and the grain is lightered at railroad expense from the cars to the elevator.

The difference in physical operations might indicate that the rates to the ports would not have to be the same; to that extent, the Commission's statement that the terminal operations are sufficiently different "to warrant" the differential may well be accurate. And of course this was all the Commission had to decide in the 1941 proceeding, for there the carriers were defending the differential against attack by the New York port interests. *Port of New York Authority* v. *Baltimore & Ohio Railroad Co.*, 248 I.C.C. 165 (1941). The present proceeding is quite different. Here it was not sufficient for the Commission to find that the dissimilar terminal operations *warrant* the carriers in maintaining a differential; the Commission had to find something more, namely, that the difference in terminal operations *requires* the carriers to maintain the differential in order to avoid violation of some specified section of the statute. The Commission made no such finding.

There was no finding, and no basis in the record for a finding, that this greater terminal service would make the proposed rates to New York noncompensatory or so low as to burden other traffic or in some other particular to violate § 1(5). Indeed, in view of the uncontroverted evidence that the new rate would be well in excess of the minimum previously set by the Commission, any finding of such violation of § 1(5) would be difficult to sustain.

Nor was it found in the report that the proposed rate equalization would be unjustly discriminatory as to shippers, in violation of § 2. The shipper does not receive any more for his money because of the greater terminal service at New York; he gets his grain moved from Buffalo to shipside at each of the North Atlantic ports, however that is accomplished in the particular port.

Finally, the Commission did not find that, because of the difference in terminal operations, equalization of rates would unduly prejudice Baltimore and Philadelphia or unduly prefer New York, in violation of § 3(1). It is conceivable that the railroads serving New York absorb a greater amount of expense out of their line-haul rate than do the Baltimore and Philadelphia railroads and thus under a system of equal rates would receive a lower net return.

But on the record before the Commission and the history of the differential, a holding of undue prejudice on the basis of terminal costs would not have been warranted. As pointed out previously, such costs played no part in the establishment of the differential by the Commission in the 1905 proceeding, and the record contains no evidence indicating the relative costs of serving the various ports or what relation those costs bear to a differential of 0.5 cent. The Commission has frequently stated in the past, in refusing to change the differential, that neither comparative distances nor terminal operations are of controlling importance. See *Baltimore Chamber of Commerce* v. *Ann Arbor Railroad Co.*, 159 I. C. C. 691, 696 (1929); *Port of New York Authority* v. *Baltimore & Ohio Railroad Co.*, 248 I. C. C. 165, 175-76 (1941). Indeed, when New Jersey claimed that the lighterage system in New York harbor was unduly prejudicial to New Jersey and introduced evidence tending to show that the expense of the lighterage system on all cargo considerably exceeded that for direct loading, the Commission refused to require the New York railroads to make any extra charge for the service. *State of New Jersey* v. *Baltimore & Ohio Railroad Co.*, 245 I. C. C. 581 (1941). See also *Baltimore Chamber of Commerce* v. *Ann Arbor Railroad Co., supra.* Certainly some more definite statement would have to be made in the report to justify us in inferring that the Commission had intended to depart from its prior decisions and to hold that the rates to New York, Philadelphia and Baltimore would be unduly preferential or prejudicial unless they reflected the difference in the cost of the terminal service rendered, and that 0.5 cent per hundred pounds was an accurate reflection of that difference in cost.

The same difficulties are presented with respect to the only statement in the report which might be suggested as a possible cost-of-service ground for cancelling the proposed rates to Boston and Portland. The Commission states (278 I. C. C. at 37):

> "The terminal services at Boston and Portland are not materially different from those at Baltimore and Philadelphia, but the distances from Buffalo to Boston and Portland are, respectively, 69 and 141 miles greater

than to New York, and 63 and 135 miles greater than the average of the distances to Baltimore and Philadelphia. Because of these substantially longer hauls to Boston and Portland than to New York, which so far as appears are at least not more than offset by the greater terminal service at New York than at the other two ports, it is apparent that the transportation conditions afford no warrant for more favorable treatment of Boston and Portland than of New York."

The "distances" referred to by the Commission are the short-line tariff distances from Buffalo, set out in a chart printed in the report (278 I. C. C. at 34); they are not necessarily the average working distances to the ports,[4] and offer little indication of the comparative costs to the carriers serving the various ports. No such cost data appears in the record.

Here again, the proposed rates would exceed the minimum previously set by the Commission; the Commission did not find that they would be noncompensatory or so low as to burden other traffic; the Commission did not find that they would result in undue prejudice to Baltimore and Philadelphia. It merely found that the longer hauls to Boston and Portland than to *New York* precluded giving Boston and Portland more favorable treatment than New York. Of course, if the Commission was in error in cancelling the proposed schedule of rates to New York, this particular reason for cancelling the proposed rates to Boston and Portland, even if otherwise a valid one, necessarily falls to the ground. Moreover, the Commission has previously stated that the difference in distance to Boston was not of suffi-

[4] From an exhibit filed by plaintiffs it appears that the short-line tariff distances bear little relation to the average working distances, as can be seen from the following figures, with the short-line tariff distances from Buffalo in parentheses: Albany 358 (297); New York 467 (406); Baltimore 562 (402); Philadelphia 447 (421); Boston 550 (475); and Portland 602 (547). The average working distance to Baltimore is thus greater than that to Boston and only 40 miles less than that to Portland. There was also evidence to show that the distance over the B. & O. from Buffalo to Baltimore is 582 miles and the average of the Western Maryland routes to Baltimore is 577 miles.

cient magnitude to require a higher rate than to Baltimore and Philadelphia. *Maritime Association of Boston Chamber of Commerce* v. *Ann Arbor Railroad Co.*, 95 I. C. C. 539, 571-72 (1925).

The statement in the report which looks most like a finding of violation of the statute, and which has been the chief target for attack by the plaintiffs as well as by dissenting Commissioner Mahaffie, was apparently intended as an answer to the plaintiffs' contention that the present proceeding in which they initiated a proposal to wipe out the port differential must be distinguished from the 1941 proceeding where they had been defendants opposing equalization. The Commission stated (278 I. C. C. at 38):

> "The status of the carriers as respondents in a suspension proceeding, instead of defendants in a complaint proceeding, does not relieve them of the burden of showing that the proposed rates are just and reasonable, and this burden includes rebuttal of any evidence tending to show that equalization as proposed would have an effect upon the movement of traffic that would be unjust to Baltimore and Philadelphia."

The meaning of this sentence is not entirely clear. Surely, the Commission did not intend to say, as Commissioner Mahaffie apparently construed the remark, that the burden of showing a rate reduction to be just and reasonable includes the burden of proving that it will result in no diversion of traffic from one port to another. That would in effect be requiring the carriers to show that the reduction they proposed would be futile. Perhaps the use of the word "unjust" in the sentence quoted would imply that carriers in an effort to meet competition could reduce rates to bring about some diversion, but not too much. In any event, the statement falls short of an express finding that the proposed rate equalization would result in such a drastic diversion of traffic as to work undue prejudice to Baltimore and Philadelphia and thus to violate § 3(1), the only section of the statute specifically dealing with the matter of port relationships. Hence, we think it is not a sufficient basic finding to support the Commission's ultimate conclusion.

Even if the statement is treated as a finding that rate equalization would produce such extensive diversion of traffic as to prejudice unduly the ports of Baltimore and Philadelphia, such finding is not supported by substantial evidence on the record as a whole. Administrative Procedure Act, § 10(e), 5 U.S.C. § 1009(e); cf. *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 (1951). The objections which the B. & O. and other intervening defendants advanced before the Commission were wholly to the effect that if the rates were equalized, Baltimore and Philadelphia could not compete equally with New York when "normal" times return, that is, when the governments of the United States and Great Britain cease to control the grain movement, and the traffic reverts to commercial exporters who ship in parcel lots rather than in full-cargo lots. It was not suggested that such inability to compete was anticipated so long as the present "abnormal" conditions exist; and a witness for Commodity Credit Corporation testified that, under present conditions, he did not foresee "any drastic or widespread diversion of this traffic" as a result of the proposed equalization. That it was this possible future situation which the Commission was considering is borne out by its earlier paragraph of findings (278 I.C.C. at 37):

> "There appears to be no dissent from the expressed view that the Government will gradually relinquish its position as the principal shipper of export grain, and that grain shipments in the future will be increasingly in parcel lots, in which event New York, with its more frequent and direct sailings, will again benefit as the logical port for such shipments. The normal movement of grain is in parcel lots, and New York has been and will continue to be the predominant port for the exportation of parcel-lot grain. Philadelphia and Baltimore are primarily cargo-lot ports, and were the 0.5-cent differential eliminated there would be no important inducement to a private exporter to select either of these ports as an outlet for parcel lots of grain."

Evidence that at some time in the future under changed conditions New York might have too great a competitive

advantage if the rates are equal is not a sufficient basis for finding that such equalization must now be denied on the ground of undue preference or undue prejudice. The Commission must of course always look ahead in making a finding that undue prejudice would result from a given course of conduct; but there should be a certain immediacy to that future effect. And on the record in this case there could certainly be no basis for finding that the return to "normal conditions" would take place in the near, or even in the foreseeable, future. None of the witnesses on either side would hazard a guess as to when conditions might change, and a witness from the Department of Agriculture testified: "Though the world food situation can probably no longer be regarded as critical there still appears a need during the next few years for continued very large exports, though perhaps somewhat reduced from the last two or three years." Should future changes in conditions cause the rate equalization to result in undue prejudice, the Commission can correct the situation at that time.

The protesting railroads offered no suggestion whatever that equalization of rates now or at any time in the future would bring about such a diversion of traffic as to result in undue preference to Boston and Portland, and the above-quoted paragraph in the report, which is apparently subsidiary to the finding of "unjust" effect on traffic, does not mention these two cities. Indeed, in the light of plaintiffs' showing that Boston has had only an inconsequential amount of this grain over the years and Portland has apparently had none, it would be difficult to conceive of their obtaining such a large share of the traffic that undue prejudice would result to Baltimore and Philadelphia. As far as the record shows, Boston and Portland do not have any advantage as to more frequent or direct sailings, such as New York is claimed to have, and Boston and Portland do not appear to have any other advantage which must be offset by a differential. Apparently, the only advantage Boston ever had was the lower ocean rate, which the Commission found no longer exists.

Finally, we do not think the Commission's ultimate con-

clusion is adequately supported by its statement that an "important and long-standing adjustment such as the one under consideration should not be changed to meet conditions of a temporary nature, even though somewhat protracted and of uncertain duration, unless it clearly appears that the transportation standard has been departed from and that injury has resulted from such departure." (278 I.C.C. at 37-38.) While the Commission may properly consider the "long-standing" nature of a differential as a factor in refusing to upset it or allow it to be changed, see *I.C.C.* v. *Louisville & N. Railroad Co.*, 227 U. S. 88 (1913), age alone seems an insufficient reason for denying a carrier the right to change a differential. See *United States* v. *Chicago, M., St. P. & Pac. Railroad Co.*, 294 U. S. 499, 507-08 (1935). During the long period of its existence, the differential has been under frequent attack, and although in all these proceedings the Commission has found the differential lawful, it has not since 1905 held or even suggested that 0.5 cent is the only proper differential. Always, it has commented on the age of the differential and refused to take any action toward changing it. Even the possibility that a rate war might result from a change in a long-standing adjustment has been considered an insufficient justification for the Commission's refusal to allow a carrier to alter the rate relationship, since the Commission has adequate power to deal with such a situation should it arise. See *United States* v. *Chicago, M., St. P. & Pac. Railroad Co., supra* at 509. Here there has been no real threat of any rate war. The only suggestion of such a possibility was the statement made at the close of the hearing before the Commission by counsel for the B. & O. that, if the reduction was allowed, that carrier would propose a like reduction in its rates to maintain the differential; no such statement was made on behalf of any of the other carriers.

We conclude, therefore, that the Commission's decision lacks the support of adequate findings and substantial evidence, and must be set aside. We find it unnecessary to pass on the plaintiffs' additional contention that, since export rates on all other commodities from Buffalo are the same to

all the ports, the rate equalization on ex-lake grain proposed here is in fact required by the Jones Amendment, 54 Stat. 902 (1940), now § 3(1a) of the Interstate Commerce Act.[5]

A judgment will be entered setting aside the order of the Interstate Commerce Commission.

APPENDIX "B"

UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

Nos. 51-65. Civil Action

THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL., *Plaintiffs,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

JUDGMENT

MAGRUDER, *Chief Circuit Judge;* SWEENEY, *Chief District Judge,* and FORD, *District Judge:*

In accordance with the opinion of the Court handed down on July 30, 1951 in the above entitled action, it is hereby Ordered.

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[5] "It is hereby declared to be the policy of Congress that shippers of wheat, cotton, and all other farm commodities for export shall be granted export rates on the same principles as are applicable in the case of rates on industrial products for export. The Commission is hereby directed, on its own initiative or an application by interested persons, to make such investigations and conduct such hearings, and, after appropriate proceedings, to issue such orders, as may be necessary to carry out such policy."

The order of the Interstate Commerce Commission of May 4, 1950, is set aside.

By the Court.

JOSEPH J. DUWAN,
Deputy Clerk.

Approved:
CALVERT MAGRUDER,
GEORGE C. SWEENEY,
FRANCIS J. W. FORD.

Judgment entered July 30, 1951.

JOHN A. CANAVAN,
Clerk;
By JOSEPH J. DUWAN,
Deputy Clerk.

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wage and equitable working conditions,—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * * * * *

Section 1(5)(a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and

reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * * * * * *

Section (6) It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

* * * * * * *

Section 3(1): It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, etc.: Provided, however, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 3 (1a): It is hereby declared to be the policy of Congress that shippers of wheat, cotton, and all other farm commodities for export shall be granted export rates on the same principles as are applicable in the case of rates on industrial products for export. The Commission is hereby

directed, on its own initiative or an application by interested persons, to make such investigations and conduct such hearings, and, after appropriate proceedings, to issue such orders, as may be necessary to carry out such policy.

* * * * * * *

Section 14 (1): That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

* * * * * * *

Section 15 (1): That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that

the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Section 15 (7): Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid,

and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

* * * * * * *

Section 15 (a) (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

6

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 410

INTERSTATE COMMERCE COMMISSION, ET AL., *Appellants,*

v.

THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL., *Appellees.*

Appeal from the United States District Court for the District of Massachusetts.

BRIEF OF APPELLANTS AND INTERVENING APPELLANTS NAMED BELOW IN OPPOSITION TO MOTION TO AFFIRM BY CERTAIN APPELLEES.

DANIEL W. KNOWLTON,
EDWARD M. REIDY,
PAUL V. MILLER,
ANTHONY P. DONADIO,
LOCKWOOD W. FOGG,
W. HARVEY SMALL,
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INTERSTATE COMMERCE COMMISSION, ET AL., *Appellants*,

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THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL., *Appellees.*

Appeal from the United States District Court for the District of Massachusetts.

BRIEF.

Preliminary Statement.

This is a reply under authority of Rule 7(3) to a motion to affirm filed by appellees and received October 12, 1951. The history of the litigation and the pleadings are described in the motion. At this point we have only this comment to make: The statement concerning the background of the differential omits the important and uncon-

troverted fact that the differential between Philadelphia and Baltimore on the one hand and New York, Boston, etc., on the other hand, which has been in effect since 1905, was found necessary by the Interstate Commerce Commission as the only way to avert destructive competitive practices and rate wars among railroads to the detriment of the public interest. The decision which was reviewed and set aside by the court below is reported as *Export Grain, Buffalo to New York,* 278 I. C. C. 31. The decision below is reproduced as Appendix A of the Statement as to Jurisdiction filed with this appeal. (*New York Central et al.* v. *United States,* 99 Fed. Supp. 394.)

Questions Presented.

Under par. (4) of Rule 7, the motion to affirm is not sustainable except upon a showing that "the questions on which decision of the cause depends are so unsubstantial as not to need further argument." We submit that several substantial questions are presented by the appeal* among the most important of which are the following:

1. Whether the court below has improperly substituted its judgment for that of the Interstate Commerce Commission (herein called the Commission) on purely administrative questions.

2. Whether the Administrative Procedure Act** has so affected the scope and function of judicial review that the evaluation of evidence on questions of reasonableness or lawfulness of freight rates by the Commission has become subordinate to or coequal with that of the reviewing court.

3. Whether the Court erred in holding in effect that the Commission is without power to find not justified a proposed rate simply because such rate falls quantitatively within the so called zone of reasonableness.

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* As indicated in the Assignment of Errors accompanying the appeal.

** Section 10(e), 5 U. S. C. § 1009(e).

We submit that those questions and each of them, arising during the formative stages in the judicial interpretation of the Administrative Procedure Act, present questions of compelling and national importance. This is especially true when it is considered that the Commission is the oldest independent administrative agency of the Government and that its decisions gave rise to the doctrine of administrative finality as it has been developed throughout the years by this court.

Argument.

1. Beginning with *Interstate Commerce Commission* v. *Ill. Cent. R. Co.*, 215 U. S. 452, this court has consistently held that it will not "usurp purely administrative functions" by setting aside an order of the Commission which is based on substantial evidence, upon its "conception as to whether the administrative power has been wisely exercised" or "whether on like testimony it would have made a similar ruling."* In *Virginian R. Co.* v. *United States*, 272 U. S. 661, 665, 666, this court, speaking through Mr. Justice Brandeis, said that it

> has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it.

And in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 127, 139, 140, this court, speaking through Mr. Justice Frankfurter, said:

> From these general considerations the court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. ed. 553, 27 S. Ct. 350, 9 Ann. Cas. 1075. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon

* As stated in *Interstate Com. Comm.* v. *Union Pac. R. Co.*, 222 U. S. 541.

by the Interstate Commerce Commission before a court can be invoked. The other is the doctrine of administrative finality. *Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow.* Only questions affecting constitutional power, statutory authority, and the basic prerequisites of proof can be raised. If these legal tests are satisfied, *the Commission's order becomes incontestable.* Interstate Commerce Commission v. Illinois C. R. Co., 215 U. S. 452, 470, 54 L. Ed. 280, 287, 30 S. Ct. 155; Interstate Commerce Commission v. Union P. R. Co., 222 U. S. 541, 56 L. ed. 308, 32 S. Ct. 108. (Italics ours.)

Movants argue that these familiar landmarks in the creation and development of the doctrine of administrative finality are without significance here. The chief predicates for this argument are (a) that the court below did not "substitute its judgment for the Commission's but found that the Commission had failed to perform its functions as an administrative body" and (b) that the Commission did not "prescribe" the differential adjustment in its 1905 decision.

The first contention above cited calls for the closest scrutiny. Movants deny that there has been a substitution of the court's judgment for that of the Commission, yet pages 6 to 9 of their motion clearly portray several instances of such substitution. They seek to draw some nebulous distinction between a conclusion based upon a "substitution of judgment" and a conclusion based upon a "failure (of the Commission) to perform an administrative duty." As to the former, we submit that where a court disagrees with the Commission on the *weight* to be accorded to undisputed facts and allows its judgment to prevail there has been a clear substitution. As to the latter, we pose this question: In the light of the propositions

(a) That the statute under which the Commission functioned in this case* carries with it a specific provision

* Section 15(7) Interstate Commerce Act.

casting the burden upon a carrier proposing a "change" in a rate to show that the proposed "changed" rate is "just and *reasonable*," and

(b) That this court in *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, held that the jurisdiction of the Commission on questions of "reasonableness" is original and exclusive,

just what sort of a quasi-jurisdictional finding must the Commission make in order to support its ultimate conclusion that this statutory burden has not been met?

Movants, as well as the court below, are confusing the so-called "quasi-*jurisdictional*" findings with what may best be described as "*evidentiary*" findings leading to an ultimate conclusion. The distinction is plain between the two. For example, section 1(2) of the Interstate Commerce Act sets forth that the act does not apply to transportation "wholly within one State." Under Section 13(4) of the Act, however, the Commission is empowered to override the State authority if it finds that State rates create either (a) undue prejudice against interstate shippers, etc., or (b) unjust discrimination against interstate commerce, as such. Either finding is "quasi-jurisdictional" in relation to the exercise by the Commission of the power to oust the authority of the State. Thus, in *Florida* v. *United States*, 282 U. S. 194, this court held that such findings stated merely "as a conclusion in the language of the statute" were not enough. In a later decision (*Florida* v. *United States*, 292 U. S. 1, 11) this court sustained a second order of the Commission with respect to the identical rate adjustment and buttressed by appropriate findings.

Similarly, in *United States* v. *Baltimore & O. R. Co.*, 293 U. S. 456, this court held that the failure of the Commission to make the quasi-jurisdictional finding required by the Boiler Inspection Act, i.e., that use of hand-operated reverse gears would create "unnecessary peril to life or limb" was sufficient to invalidate its order compelling the carrier to install power reverse gears. But in its decision

this court was careful to explain the distinction between "what may be termed quasi-jurisdictional findings" as contrasted with a "complete statement of the grounds of a Commission determination." At pages 464, 465, it said:

> In the Florida Case the legal distinction was pointed out between what may be termed quasi-jurisdictional findings, there held to be indispensable, and the "complete statement of the grounds of the Commission's determination" which was declared in Beaumont, S. L. & W. R. Co. v. United States, 282 U.S. 74, 86, 75 L. ed. 221, 229, 51 S. Ct. 1, to be desirable for a proper consideration of the case in the courts The lack of such a complete statement, while always regrettable, because unnecessarily increasing the labor of the reviewing court, compare Virginian R. Co. v. United States, 272 U. S. 658, 675, 71 L. ed. 463, 472, 47 S. Ct. 222, *is not fatal to the validity of the order.* It is true that formal and precise findings are not required, under § 14(1) of the Interstate Commerce Act, which declares that the report "shall state the conclusions of the Commission together with its decisions." Compare Manufacturers R. Co. v. United States, 246 U. S. 457, 487, 62 L. ed. 831, 846, 38 S. Ct. 383. Meeker v. Lehigh Valley R. Co., 236 U. S. 412, 428, 59 L. ed. 644, 656, 35 S. Ct. 328, Ann. Cas. 1916B, 691, P.U.R. 1915D, 1072. That provision *relieves the Commission from making comprehensive findings of fact* similar to those required by Equity Rule 70½. But § 14(1) does not remove the necessity of making, where orders are subject to judicial review, *quasi-jurisdictional* findings essential to their constitutional or statutory validity. (Italics ours.)

Under the rule of the *Abilene Case* (204 U. S. 426) which confers plenary jurisdiction upon the Commission with respect to questions concerning the reasonableness of rates, the only "quasi-jurisdictional" finding which possibly could be made in this case would of necessity be couched in language identical with that which would be employed in setting forth the ultimate conclusion. That being so, the requirement of such a finding is satisfied by the ultimate

conclusion that the proposed change in rates was not shown to be "just and reasonable." Stated another way, the necessity for such a finding as a condition precedent to the validity of a Commission order is not present in this case. As pointed out by this court in *Alabama Great S. R. Co.* v. *United States*, 340 U. S. 216, 228:

> The statute requires the Commission only to file a written report, stating its conclusions, together with its decision and order. This the Commission did, and the essential basis of its judgment is sufficiently disclosed in its report. Of course § 14(1) does not relieve the Commission of the duty to make the "basic" or "quasi-jurisdictional" findings essential to the statutory validity of an order. Florida v. United States, 282 U. S. 194, 215, L. ed. 291, 304, 51 S. Ct. 119; United States v. Baltimore & O. R. Co., 293 U. S. 454, 464, 465, 79 L. ed. 587, 594, 595, 55 S. Ct. 268. *And the basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented.* E.g., United States v. Pierce Auto Freight Lines, 327 U. S. 515, 90 L. ed. 821, 66 S. Ct. 687; North Carolina v. United States, 325 U. S. 507, 89 L. ed. 1760, 65 S. Ct. 1260; Yonkers v. United States, 320 U. S. 685, 88 L. ed. 400, 64 S. Ct. 327; United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 86 L. ed. 971, 62 S. Ct. 722. Here the Commission found, in conformity to the statute invoked, supra, note 2, that the differentials prescribed the "justified as reasonable" and "necessary and desirable in the public interest."* And "the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data . . ." United States v. Louisiana, 290 U. S. 70, 80, 78 L. ed. 181, 188, 54 S. Ct. 28. Enough has been "put of record to enable us to perform the limited task which is ours." Eastern-Central Motor Carriers Asso. v. United States, 321 U. S. 194, 212, 88 L. ed. 668, 680, 64 S. Ct. 499. (Italics ours.)

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* It is quite significant that the findings so approved are "in the language of the statute."

Agreement with our position in this matter of administrative finality would not, as movants suggest, (p. 4) make of a reviewing court an "automata" or a mere "judicial echo of the Board's conclusion." Such a court may continue, as it always has, to insist upon "substantiality" (Compare *Interstate Com. Comm.* v. *Union Pac. R. Co.*, 222 U. S. 541; *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88) or that the Commission has correctly interpreted the statute which underlies its order in a particular case (Compare *United States* v. *Missouri Pac. R. Co.*, 278 U. S. 269). But the duty to examine countervailing as well as direct evidence in order to determine the question of substantiality does not confer upon a reviewing court concurrent jurisdiction to determine questions concerning the reasonableness of rates (Compare *Texas & P. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426).

In our discussion of this question we are not to be understood as in agreement with the assertion that the Commission in its decision failed to include the "complete statement of the grounds of (its) determination" declared to be "desirable" in *Beaumont S. L. & W. R. Co.* v. *United States*, 282 U. S. 74, 86.

In the second contention cited movants are merely playing with words. It is true that the Commission in its decision dated April 27, 1905, did not "prescribe" these differentials *by order*. At that time and under the rule laid down by this court in *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 512 (decided May 24, 1897) the Commission was without power to enter an order fixing rates for the future. But the Commission announced its opinion as to the proper differentials at the specific request of all interested parties—carriers, shippers and ports—and its pronouncement has withstood the impact of some six specific attacks, spaced throughout almost a half century.

2. To accept the view advanced by movants and implicit in the decision of the court below, that the requirement of

substantiality, set forth in the Admistrative Procedure Act, vests in a court of review an authority coequal with that of the Commission in weighing and preponderating conflicting evidence as to the "reasonableness" of a proposed rate, would be tantamount to overruling the *Abiline Case*,* as well as the doctrine of administrative finality. Nothing in the Act itself or in the decision of this court in *Universal Camera Corp.* v. *National L. R. Bd.*, 340 U. S. 474, which interprets the Act in that respect stands for such a result. As stated at page 488:

> To be sure, the requirement for canvassing "the whole record" in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect.

The difficulties which beset the courts in recognizing the twilight zone between a search *for* evidence and a "substitution of judgment" on it are ably set forth at p. 489 of the above decision where the court stated:

> Since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old. There are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms.
>
> Whatever changes were made by the Administrative Procedure and Taft-Hartley Acts are clearly within this area where precise definition is impossible. Retention of the familiar "substantial evidence" terminology indicates that no drastic reversal of attitude was intended.

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* *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

> But a standard leaving an unavoidable margin for individual judgment does not leave the judicial judgment at large even though the phrasing of the standard does not wholly fence it in.

It would be grim irony, indeed, if the Administrative Procedure Act were to be used as the means of setting aside a Commission order on the question of the weight to be accorded conflicting evidence on a question of reasonableness. No decision of the Commission has ever been set aside by this Court on such a ground, or because it acted without evidence, contrary to the evidence, or arbitrarily and capriciously with respect to its evaluation of the evidence. In those relatively few instances where its decisions have been set aside this court has found for the most part that it has misconstrued the statute (e. g. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475); or has failed to make the requisite quasi-jurisdictional findings (e. g. *United States* v. *Baltimore & O. R. Co.*, 293 U. S. 464). Apart from such circumstances the decisions of the Commission have commanded the highest respect.

As a matter of fact, the legislative history of the Administrative Procedure Act shows that none of the administrative abuses which gave rise to the demand for the legislation had found lodgment in the Commission and that the act, itself, was patterned for the most part upon section 17 of the Interstate Commerce Act, 1940, which governs the procedure of the Commission. During Commissioner Aitchison's appearance before the Committee on the Judiciary House of Representatives on June 21, 25 and 26, 1945, Representative Walter of Pennsylvania, co-author of the Walter-Logan Bill of 1940, stated:

> Mr. Gwynne and I looked at these rules and we had the idea that if the amendment were adopted that we followed pretty closely your procedure.

At another juncture Representative Jennings of the Committee remarked:

> Frankly, I have not had your Commission in mind in my consideration of this proposed measure. I have not had in mind and have never heard any criticism as I recall of the I. C. C. being arbitrary or lawless or disposed to trample on people's rights.

When the Bill was being discussed on the floor of the Senate by Senator McCarran, its sponsor, Senator Reed expressed grave concern as to what effect the new measure would have upon section 17 of the Interstate Commerce Act*. The following colloquy occurred:

> Mr. McCarran: There is nothing in this bill which would interfere with such procedure.
>
> Mr. Reed: I was a little uncertain, due, of course, to my lack of understanding of the bill and my lack of opportunity to give it the study which it requires.
>
> Mr. McCarran: I wish to make it very clear to the Senator, because I appreciate the fact that he has had long experience in practice before the Interstate Commerce Commission, that there is nothing in this bill which would take away from the Interstate Commerce Commission anything in the way of functions.
>
> Mr. Reed: And it would not change its method and rule of doing business when the method and rule is *founded on statutory authority?*
>
> Mr. McCarran. That is correct. (Italics ours)
>
> (Senate Document No. 248, 79th Cong. 2d Sess., p. 307).

Moreover, if the original drafts of the identical Bills, H. R. 1203 and S. 7, which as amended, became the law, are ex-

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* At the hearings before the House Committee Commissioner Aitchison had stated:

> Now my opinion is—and I think having been called to the bar nearly 50 years ago that I can state it for whatever it is worth and it seems good to me if it does not to anybody else, that the provisions of Sections 7 and 8 of this Bill and Section 17 of the Interstate Commerce Act can not stand together.

amined in the light of Commissioner Aitchison's testimony it will be seen that a number of important modifications were made in deference thereto. For example, Section 5 covering the "Separation of Functions" and regarded as one of the keystone provisions of the act (*Wong Yang Sung* v. *United States,* 339 U. S. 33) was modified by adding the following words:

> This subsection shall *not* apply in determining applications for *initial licenses* or to proceedings involving the *validity or application of rates, facilities, or practices of public utilities or carriers;* nor shall it be applicable in any manner to the agency or any member of the body comprising the agency. (Italics ours).

Important changes were also made in sections 7 and 8 which brought the Administrative Procedure Act in conformity with section 17, as stated by Senator McCarran.

3. The fact that a proposed rate falls within the zone of reasonableness from a quantitative standpoint does not operate as an estoppel against the Commission to conclude that such rate is not shown to be "just and reasonable". As pointed out at page 16 of our "Statement as to Jurisdiction" the relation of rates is ordinarily of more importance than their intrinsic level and a rate which is reasonable *per se* under section 1(5) of the act might well be *relatively* unreasonable under the same section. (*Wyoming Coal Co.* v. *Virginian Ry. Co.,* 98 I. C. C. 488, 496, 497; affirmed in *Virginian Ry. Co.* v. *United States,* 272 U. S. 658). The decision below grossly over emphasizes the importance of the quantum of the rates.

Conclusion.

We contend that the Commission, responsible for this differential adjustment in the first instance and having had it under review on at least six separate occasions upon complaint is in much better position than the court below to adjudicate the merits of this controversy and that its decision should stand. The questions raised are substantial

and it is believed that the court should have the benefit of oral argument and briefs on the merits in this proceeding.

Respectfully submitted,

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